UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: CenturyLink Sales Practices and Securities Litigation	File No. 17MD2795 (MJD/KMM)
	Minneapolis, Minnesota
	February 20, 2020
	2:05 P.M.

BEFORE THE HONORABLE JUDGE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT
(MOTION HEARING)

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Proceedings recorded by mechanical stenography; transcript produced by computer.

2:05 P.M.

(In open court.)

THE COURT: Good afternoon. Please be seated. Let's call this matter, please.

THE CLERK: In Re: CenturyLink Sales Practices and Securities Litigation, 17MD2795. Counsel, please state your appearances for the record.

MR. POSTMAN: Good afternoon, Your Honor. Warren Postman and Jared Shepherd for movants.

THE COURT: Good afternoon.

MR. GUDMUNDSON: Good afternoon, Your Honor. Brian Gudmundson, Zimmerman Reed, on behalf of plaintiffs.

MS. ANDERSON: Good afternoon. Carolyn Anderson on behalf of plaintiffs.

THE COURT: Good afternoon.

MS. REGAN: Anne Regan on behalf of plaintiffs.

THE COURT: Good afternoon.

MR. McNAB: Good afternoon, Judge. Bill McNab on behalf of CenturyLink and the proposed intervenors.

THE COURT: Good afternoon.

MR. WILLIAMS: Good afternoon, Judge. Mike Williams on behalf of the defendants and intervenors.

THE COURT: Good afternoon.

MS. WRIGHT: Elizabeth Wright on behalf of

CenturyLink and the intervenors.

MR. BLACKWELL: Good afternoon, Your Honor. Jerry Blackwell on behalf of CenturyLink and intervenors.

THE COURT: Good afternoon, Mr. Blackwell. You were way in the back last time.

MR. BLACKWELL: Not that far back.

THE COURT: Why am I having this hearing? I need to know what is going on here. I don't like in and around my orders. Oh, let's find out who is on the phone.

MR. LOBEL: Good afternoon, Your Honor. This is Douglas Lobel on behalf of CenturyLink and the intervenors.

THE COURT: Good afternoon.

MR. ROBINOVITCH: Good afternoon. Hart Robinovitch from Zimmerman Reed on behalf of plaintiffs.

MR. GUTKIN: Good afternoon, Your Honor. Jeff Gutkin from the Cooley firm for CenturyLink and the intervenors.

THE COURT: All right. Good afternoon. Who wants to take the lead and tell me why they're trying to fool me on this case?

MR. POSTMAN: It's our motion, Your Honor, so I'm happy to explain the rationale for the motion. So you've asked for a broader explanation. I will start broad and go narrow. Please point me more narrowly if you have specific questions. Our law firm represents thousands of individual

clients.

THE COURT: I expected you to be here when we had the initial hearing giving us the preliminary approval.

MR. POSTMAN: Yes, Your Honor. Our view --

THE COURT: We looked out in the hallway, downstairs, upstairs, in the building, calling out your name.

MR. POSTMAN: Yes, Your Honor.

THE COURT: Go ahead.

MR. POSTMAN: I am sorry. Our view is that our clients have a contractual right that is protected by the Federal Arbitration Act not to have to participate in court proceedings. We --

THE COURT: Have you had opted out? Are you planning to opt out?

MR. POSTMAN: We will opt out all the clients who want to be opted out. We I think agree, everybody agrees that our clients should be fully informed of the terms of the settlement and have an uninhibited choice to participate in the settlement.

For those who want to continue to pursue arbitrations, we think that is their right.

THE COURT: What about the three people that you've, you have named here?

MR. POSTMAN: They have reviewed the settlement

already and the motions in support of it, and they have said they want to proceed with arbitration. To make very clear, separately from the opt-out right that Rule 23 provides, the Federal Arbitration Act and arbitration agreement provide something very different that I think places this case and this motion in an entirely different context from the ordinary Rule 23 context.

If I can use a hypothetical, imagine that CenturyLink had a contract with all its consumers that said we promise we will never try to release your claims in any class action unless you affirmatively agree. I think that the FAA would clearly, if this was part of an arbitration agreement, prohibit what is going on here.

THE COURT: Has your -- have your clients paid the arbitration fees so we can get past that step?

MR. POSTMAN: A thousand clients have. The others have been waiting to see how -- CenturyLink has been fighting hard to not proceed with them. To drive home the hypothetical, though, what I want to make clear is, the actual agreement that applies here is not materially different. That is what arbitration with a class waiver means. It means they promise not to resolve our clients' claims in a class action.

Now, our clients can waive that. We don't dispute it, but that takes an affirmative step. You don't

lose your contract right because someone sends you a notice and says, hey, you want to give this up, and you don't respond and you've lost the very right to not be involved in that. So that's broader context to your question of why we did not show up.

And I don't want to assume, but I could understand if Your Honor has frustration arising from the fact that this has been a long, large case and that this is an additional hurdle to resolving it. I understand that. Respectfully, I think the responsibility for that lies with parties who ask for an injunction that under clear Eighth Circuit precedent in my view is not lawful.

THE COURT: Well, I run marathons. I don't run sprints. I have an MDL that has been going on since, what, 1983.

MR. POSTMAN: As I said, I don't want to presume. I just want to --

THE COURT: From 9,000 cases down to 2. So, so I'm here for the long haul.

MR. POSTMAN: Thank you, Your Honor. I think with that context it's important to return to the fact that this injunction in my view clearly conflicts with Section 3(b) of *Piper Funds*. There is two separate sections in that opinion. There is two separate holdings reversing two separate orders, and Section 3(b) says that the FAA

requires arbitration agreements to be enforced and that an injunction prohibiting them from being enforced violates the FAA.

The facts that the parties point to to try to get around *Piper*, it's actually remarkable. They're all from separate section of *Piper*. Every time you see a pin cite to 304, that's the discussion of the opt-out order section. There is no real analysis respectfully from the parties about how it can be consistent with the Federal Arbitration Act to render unenforceable an arbitration agreement when the FAA expressly says that is what cannot happen. It must be enforceable.

Piper says even for a time, if the agreement is rendered unenforceable even for a time, that is contrary to the FAA. So we think we are extremely likely, virtually certain, to prevail on appeal on that question, and with that in mind, I think it makes the rest of the stay factors tip heavily in favor of a stay or actually just revising, eliminating the injunction which would avoid the need for the appeal.

You know, on injury to movants, Piper itself said in the opt-out section of the opinion, even being delayed in your right to arbitrate for a time frustrates the purpose of the arbitration agreement. That's an injury by itself. Belated enforcement of the arbitration clause, I

am quoting, significantly disappoints the expectations of the parties.

Now CenturyLink in their briefing on this motion raises arguments about why they don't think they should have to proceed with movants' arbitrations, but I think that gets ahead of the game. There is no real dispute that movants are barred by the injunction from seeking arbitration, and that's the right that they have that's protected under the Federal Arbitration Act.

So injury to movants I think is established under *Piper*. If we look at injury to the other class members, plaintiffs basically say that they don't want to let movants opt out because it would reduce CenturyLink's motivation to settle. I think that's a pretty stark admission that plaintiffs are trying to subjugate the interest of movants for the benefit of the rest of the class.

I don't think that's permissible or an interest that should weigh against the stay, and that's at page five of their decision where they say that defendant would have a reduced incentive to settle. I am sorry. Page five of their opposition. I also note there is no benefit to the class to putting this issue off if there is reversal in the Eighth Circuit and it comes back and having this be disrupted months from now when it can be resolved now.

Then that brings us to the injury to CenturyLink. I understand why they don't want to face additional claims and additional risk of liability, but they don't have any cognizable interest in avoiding that. I think we all know that this very settlement and this action is substantially lower because plaintiffs needed to calculate and take account of the real risk that the entire case would be compelled to arbitration.

CenturyLink has obtained a major benefit from saying that these claims should be taken to arbitration. The very relief they were seeking compelling arbitration is now what they are saying is irreparable harm to them. I don't think they can have it both ways. If they say we're going to force people to go arbitrate and then a substantial number take them up on it, there may be questions about the process, and I'm happy to talk about that.

But the idea that they can't even start, it's contrary to the FAA, and their obligation to honor their contract is not an injury for purposes of this analysis. I think the public interest factor follows from the FAA holding in *Piper* that even a temporary injunction or frustration of the ability to arbitrate is a violation of the statute, and a violation of the statute is against the public interest.

So I think that at a minimum, the Court should stay, or as I noted, I think this could all go away if it lifted the injunction. I will also note, there are basically no decisions supporting this that address the FAA. All the cases they cite, the parties cite, *Uponor*, *Medtronic*, *Zurn* where there is an injunction enjoining arbitration, this is part of a boilerplate order.

Mostly if you look at the facts, I don't think there was even an arbitration agreement in existence. None of them mention the FAA, but *Medtronic*, for example, was a stock drop securities class action, and as far as I'm aware, there is no publicly-traded entity yet that has an arbitration agreement covering those claims. Arbitration wasn't even on the horizon. It was just in the boilerplate, and it was dropped into the order.

There is no case, and likely because of *Piper*, holding where it was actually litigated that it's consistent with the FAA to enjoin the parties' ability to pursue arbitration. So that's why I think the injunction should be stayed or lifted. There is also the question that the parties have touched on about whether the rest of the order should be stayed and the opt-out process.

So for purposes of the stay motion, I'm not sure the Court needs to stay the rest of the orders or address opt-out issues. If the injunction is gone, that was the

basis for us rushing into court, but if the Court is either considering leaving the injunction in place or just wants to be pragmatic about this and think about the broader question of how to deal with this, I think it's important.

Piper also says, we're now moving to the second holding and second order addressed in *Piper*, that parties to an arbitration agreement if they want to pursue arbitration have to be allowed to opt out, and they have to be allowed to opt out outside the formal process of Rule 23 if they wish.

And that was, that was the holding I think that we agree *Piper* said, at least in that case. We will argue about distinguishing facts, and so I would say one way to make this very simple is to lift the injunction, which violates the FAA, and say that if a claimant seeking injunction submits the same sort of opt-out as in *Piper*, then they're opted out.

If that's, if that happens, we have no argument with the rest of the class proceeding, and that follows straight from *Piper*. So if you have other questions, I'm happy to address them.

THE COURT: Thank you.

MR. McNAB: Good afternoon again, Your Honor. Bill McNab on behalf of CenturyLink and the proposed intervenors. I hardly know where to begin. Counsel

mentioned rushing into court, a month late and a dollar short as Your Honor pointed out. Now, they had no notice and opportunity and could have prevented what has now happened, which is an interruption in a court ordered process. The Court is well aware of that.

I guess I would begin by saying that we believe the Court should be entirely comfortable with the preliminary approval order as entered, including the temporary injunction, because every bit of it is proper and fully comports with Rule 23, the FAA, the due process clause and the All Writs Act. There is neither a need nor a justification for a stay of any part of the Court's order.

Now, I'll cut to the chase in a moment, but I'm going to back up and just say that it appears there is one thing we agree with the movants on, and that is the applicable standard, and that is that there are four things that they have to show in order to be eligible for a stay of this Court's order: A strong likelihood of success on the merits, irreparable harm, no substantial harm to the other parties in the matter and that the motion serves the public interest.

In this instance, Your Honor, they failed not only to show all of them or any of them, they missed the boat on all of them. Now, Mr. Postman's argument today,

and this has been the case both in their initial brief and in their reply brief that they filed, I believe, or sometime yesterday, that Your Honor's order violates the FAA. I think they're wrong.

What they say, at least for purposes of likelihood of success on the merits, what they say is that, well, Section 2 provides that agreements to arbitrate shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. Well enough. That is what it says.

What is glaringly missing here, though, Your Honor, in the record before this Court is any agreement to arbitrate they have not established. We have tried for months. We have asked these folks through their counsel to tell us, What services did you procure from CenturyLink? When did you procure those services? What claims? What problems? What complaints do you have with those services, and most of all, what arbitration agreement or agreements are you claiming apply?

They have provided none. Now, Your Honor, it's axiomatic that one cannot invoke the FAA without an actual agreement to arbitrate. So until it's demonstrated, we spent months trying to demonstrate that the 35 roughly named plaintiffs had enforceable arbitration agreements, and Mr. Gudmundson and his colleagues spent an equal amount

of time trying to demonstrate to the Court that they did not exist or they were not enforceable. That has never been decided even with respect to those for whom evidence was gathered and put before the Court.

So here, we've got three people saying we have rights under the FAA, but they have not pointed to a contract that provides them a right to arbitrate. Now, with respect to *Piper*, it does not say in any way that the FAA prohibits injunctions of arbitration. It merely says that Section 16 allows appeal of interlocutory injunctions.

It's really important to note that the *Piper* court left in place the District Court's injunction with respect to every non-named or unnamed class member with the exception of Park Nicollet, a sophisticated institutional investor with a very unique arbitration agreement. Number one, it was unique at least with respect to this case because it was before the court.

Number two, it was unique because it was undisputed that it was the contract, that it was valid; and three, it was unique because it said that Park Nicollet had the immediate right to arbitrate. Here, we certainly don't have a contract. We don't have a contract that is undisputed, and we don't have a contract that says that any of these claimants or these movants have an immediate right to the arbitral forum, and that's the only party for whom

the Eighth Circuit carved out the injunction.

If the Eighth Circuit thought that injunctions that could bar an arbitration were in violation of the FAA, it would have said so. It would have vacated the injunction in its entirety. Your Honor, Counsel also noted that that's the only case and there is no case that supports defendants' and plaintiffs' position with respect to the injunction, but that's not right.

The Eighth Circuit has visited this issue three times, and admittedly, the circumstances have been different in each of those cases. They differ from each other, and to some extent they differ from this case, but the upshot is that in 1994 in *YA Group Securities*, the Court of Appeals considered, the Eighth Circuit considered, whether a District Court's injunction of an arbitration was enforceable, and it affirmed.

In *Piper Funds* that we've just talked about in 1995, the Court of Appeals left the injunction in place with respect to all of the unnamed class members with one exception, a very unique institutional investor with a very unique contract.

And number three, *Bank of America* in 2010, again, the court affirmed an injunction notwithstanding discussion of both the FAA and the due process clause, the Court of Appeals upheld the District Court's injunction prohibiting

arbitration. So it is clear that the Eighth Circuit does not have a per se prohibition. It does not consider that the FAA itself per se prohibits injunctions, and the circuit has itself affirmed them, let's call it, two and a half times out of three.

For those reasons, we think it's very unlikely that plaintiffs will prevail on the appeal. They also fail on the other necessary showings, as I mentioned. For example, irreparable harm. Well, let me back up.

With respect to the due process clause, *Bank of America* expressly held that the injunction did not violate the due process clause notwithstanding the parties' claim that it did. Now, movants have argued, well, that's different because that was a party and we're nonparties, but of course it's well settled U. S. Supreme Court jurisdiction that the All Writs Act grants this court authority to enjoin nonparties, as well as parties, in furtherance of the court's jurisdiction.

Second, and perhaps more important and as the Court sort of began these proceedings with, clearly movants had notice, actual notice and opportunity to be heard. They chose intentionally or negligently -- I don't know. Maybe they forgot to show -- well, actually I believe I saw one of their attorneys in the back of the room the day of the preliminary approval hearing. Now, I can't swear to

that, but I kind of think they actually were here. They just chose not to be heard.

So I don't think they can come to this Court or run to the Eighth Circuit and say they have been deprived constitutional due process, notice and opportunity to be heard, when they were actually here and chose not to speak.

I'll be quick on irreparable harm. They have not showed that any brief temporary delay in arbitration proceeding necessitates an irreparable harm, and with respect to harm to the other parties, the Court is well aware we are well underway with the claims administrator. We have printed some four million inserts that were to go out with bills that now may not be usable.

We had incurred tens of thousands of dollars of costs in that process, and this motion knocked that off the rails. In the meantime, the stay that plaintiffs are asking this Court to enter and the shenanigans that they are planning to bring before the Eighth Circuit potentially jeopardized the recovery by some 17 million people.

And with respect to the public interest, this Court knows well the public has a significant interest in the orderly resolution of large, complex multi district litigation. Here the Court is overseeing the proposed resolution of some 19 multi state or nationwide class actions involving some 17 million consumers and in

something like 38 states. And getting those cases resolved fully, fairly, finally and in accordance with Rule 23 is in this Court's interest, the interest of the originating courts and therefore in the interests of the public.

So finally, I would just say with respect to this question about opting out, it's curious the position that the movants' counsel has taken today is somewhat different than in the reply brief that was filed yesterday, which on page 7 says that the second issue, they refer to the second *Piper* issue, as whether or not *Piper* should have been allowed to opt out outside of the terms of the preliminary approval order, they refer to that as the second issue.

They say it's irrelevant here because movants are not attempting to opt out of the proposed class. So I don't know if they have changed their position since yesterday, but it is our position, Your Honor, as we put before the Court, these plaintiffs have now said -- these movants have now said to you that they represent thousands or tens of thousands of individuals.

We have put before Your Honor a record that demonstrates they have taken a position that they cannot give these tens of thousands of clients even 15 minutes of their time. So with that in mind, it seems to me and to us that the best thing for all class members, whether they've already signed up with these folks, whether they see Google

ads and pop-up ads out there or Facebook ads or not, the fair and right and conservative thing to do is make sure that all of the putative class members receive the same court approved notice from the court approved administrator in the same way in the same time.

And then with that proper Rule 23 process ensured for everyone, if a party chooses to opt out, that's what Rule 23 says they can do, but they opt out in accordance with the mechanisms that Rule 23 requires and that Your Honor placed in your order.

That way all of the putative class members are treated the same, and that to me just seems fair and responsible. So unless you have any questions.

THE COURT: Thank you.

MR. McNAB: Thank you, Your Honor.

THE COURT: Good afternoon.

MR. GUDMUNDSON: Good afternoon, Your Honor. The movants have a really big problem here, and that's the *Piper* case. The *Piper* case forecloses them from doing anything, either here or at the Eighth Circuit, if they don't opt out, and the language could not be possibly clearer.

I'm going to read it into the record. I think it's important. I think it's important because Mr. Postman in his briefing in front of you today looked you in the eye

and said that there were two separate holdings: One about a March 3rd order related to the entry of an injunction, and the Eighth Circuit addressed the second order on April 3rd related to the denial of an opt-out.

Let me read the conclusion. It's listed under a title called Conclusion in the order of *Piper*. This is a quote. "The District Court's March 3rd order," that's a preliminary approval order within the injunction, "and the April 3rd order," denying the opt-out, "are reversed insofar as and only insofar as they affect Park Nicollet Medical Foundation."

Everything was held in place except for Park Nicollet Medical Foundation. Why is that? On page 304, which Mr. Postman doesn't like and I agree, he shouldn't like it, is the conclusion of the analysis on the court's denial of an opt-out request at the District Court level, and the Eighth Circuit said, quote, "In these circumstances, the court abused its discretion in refusing to enter an order excluding Park Nicollet from the class."

Your Honor, it's the plaintiffs' position, it's stated as clearly as can be in our papers, and I will state it as clearly as I can to you today. We have received no opt-out requests from these movants. If they do, we're obliged to follow *Piper*. If they satisfy *Piper* and if they satisfy the settlement agreement, they ought to be gone,

but that's not what they want.

The reply just came in yesterday. I'm not sure who all has had a chance to read it yet, but it goes on at some length about Section 2 of the FAA, and what Mr. Postman really wants, I believe, is to stay in the MDL and do what he wants with his clients.

The issue with that is that the judicial panel in a multi district litigation saw fit to create an MDL and consolidate all of the cases here before Your Honor, and Your Honor saw fit to appoint lead counsel in this case, and lead counsel made a different strategic decision.

We didn't decide to pursue 17.2 million individual arbitrations for obvious reasons. We don't skive anybody's desire to go pursue a litigation strategy they want. Perhaps, Mr. Postman thinks he can represent 22,000 people capably in arbitration, but for the past several years and to the tune of multi millions of dollars of Lodestar time, attorney time, expenses, we have fought the notion that arbitration should apply in this case.

Central to Mr. Postman's reply arguments and what he is telling you today is that once you invoke Section 2 of the FAA and say that I have a right to arbitrate, I get to go arbitrate no matter what. Well, I would respectfully submit, because I have been involved in a lot of it, there are literally mountains of decisions on when a party is not

obligated to arbitrate.

Circumstances such as waiver, unconscionability, conspicuousness, a lot of things that were talked about in the hundreds and hundreds of pages of briefing before Your Honor. They can't stay in and do what they want. They must opt out if they are to get what they want. So what about this motion?

We've got a motion to stay the entire settlement for 17.2 million people pending appeal before the Eighth Circuit that has been brought before Your Honor. Certainly CenturyLink counsel invited them to appear at the preliminary approval hearing by virtue of their supplemental brief in support of preliminary approval, which one would have thought would have invoked most anybody to come and appear to defend their actions, but they didn't.

The first stay issue is whether Keller Lenkner and their clients can win on the merits of their appeal. They cannot. They simply cannot. It will not take Your Honor or anybody else very long to read that *Piper* case and realize you have to opt out if you're going to do what you want, and if you do, they're gone.

If they satisfy the requirements of *Piper* and they satisfy or arguably satisfy, we have not seen any requests for an opt-out, the terms of the settlement

agreement, we are obliged to follow *Piper*, and they can go do whatever they want as far as we're concerned.

But the bigger point is, I wouldn't say it's the bigger point, but a primary point is that the injunction itself is valid. *Piper* said it was valid. *Piper* said it was valid for every single person other than the one who requested to opt out. The All Writs Act allows that we brief that.

The District Court decisions, Judge Montgomery in *Zurn Pex* and *Uponor* contain almost identical language to the injunction at issue here in a variety of other cases from *Target* to the *Dryer* case to other cases that I've been involved with in this district. It takes on different forums.

It's an okay argument, I guess, to say, well, they didn't raise the issue there, so we don't know if it's legal or not, but I guess I would say, I don't think that Judge Montgomery and I don't think the litigants before federal District Court are in the habit of submitting illegal provisions to sneak one by unwary consumers and other litigants.

But the bigger point of course is that *Piper* requires these folks to opt out if they want to get where their going. I'm going to quote, Mr. McNab quoted itself and said the movants are not willing to opt out. They put

it in the reply brief. It is inexplicable. I don't understand it, but there it is.

The other big issue as far as we're concerned is the issue of irreparable harm. There can be no irreparable harm if they opt out and pursue their arbitration. I fully respect the fact that the plaintiffs in the MDL are in a different position than CenturyLink, who have to deal with opt-outs once they happen, and that CenturyLink counsel may take a different position as to whether they can immediately arbitrate.

As far as we're concerned, we have not seen an opt-out request. If and when we see it, we will measure it against the requirements of *Piper*. We'll measure it against the requirements of the settlement agreement, and we believe we're obliged to follow *Piper*.

We've talked about the concept of strategic delay here. Did they or did they not appear in court? Did they or did they not decide to go to the Eighth Circuit instead of Your Honor? If they did, certainly that's not irreparable harm. That's a choice to game the system, but it also could have been accidental.

It might warrant it if perhaps they didn't know what was going on or something like that and they missed the deadline to submit a motion for reconsideration, but we think that the Court can still provide guidance on the

issue of this injunction.

The Court is going to be asked to render a ruling with respect to the likelihood of success on the merits, and plaintiffs believe it's important that the Court does so, and one of the reasons is notice. You received a letter from Mr. Lobel yesterday with which both parties joined, and the nature of that letter talked about the impact that this issue has had on notice.

Notice in this case is important because there is a lot of class members. There is 17.2 million class members, and the parties with the prospect of language being changed within the notice have taken a very cautious approach. I will say my opinion, of course, is that *Piper* is very clear.

We think that the language in the notice as written is okay, but some guidance from Your Honor would be quite helpful, and I'm sure that, that it's eminently possible when ruling on the likelihood of success on the merits.

THE COURT: All right.

MR. GUDMUNDSON: That's really all I had, Your Honor. If there is anything you want to discuss --

THE COURT: Thank you. Please.

MR. POSTMAN: Thank you. Thank you, Your Honor. You know, you'll read *Piper* for yourself. Obviously I've

got to say, this idea that it doesn't say that an injunction against arbitration violates the FAA, I'm reading from page 302 just before 3(b). The principal issue on this appeal is whether the District Court violated the --

THE COURT: Let me get there.

MR. POSTMAN: I'm sorry. Pin cite 302, halfway down before where Section 3(b) starts.

THE COURT: Okay. Go ahead.

MR. POSTMAN: The principal issue on this appeal is whether the District Court violated the FAA as construed in McMahon when it enjoined Park Nicollet from proceeding with an arbitration to which it was contractually entitled."

It then has a part B that says the order enjoining arbitration, and it explains why the order was unlawful. It has a part C that refers to the separate order refusing Park Nicollet's request to opt out and says that refusing to let Park Nicollet opt out was unlawful. Mr. Gudmundson read the conclusion, but he inserted a "because" and "therefore."

What it says is that, point 1, the two orders are reversed in so far and only insofar as they affect Park Nicollet, but that doesn't mean everyone else was lawful. That means the court decided the rights of the parties

before it. That is routine for courts to do. You can't read in, "and therefore everything is okay."

The Court held that the order enjoining the arbitration was unlawful as to the parties before it and vacated it, and then it said, "and," not "or," and the District Court's refusal to let the party opt out outside the Rule 23 process based on the letter submitted by its counsel was unlawful.

Courts decide the rights of parties before them. As I said, Your Honor, Your Honor of course will draw your own conclusions, but I think the language -- I mean the Court teed up, the question was whether the injunction violated the FAA, and then it said this injunction was unlawful.

To be clear, too, we can parse language and words in the order and the conclusion, but what was the reasoning of the decision? The decision didn't just say here's a bunch of facts and then here's the outcome. The reason was because the FAA requires that arbitration agreements be enforced, and the injunction rendered it unenforceable.

I know we have starkly opposing views of the case, and that's fair. I think it is inescapable that the injunction is unlawful. *Bank of America* was a case in which the court held there was no arbitration agreement. So to say the FAA doesn't prohibit the injunction doesn't

follow.

Piper is the most recent case addressing this topic and says expressly that it is unlawful. I do have to say, and I don't want to get too far into it because I think it's a side show, but the suggestion that we said we cannot represent 10,000 people is based on a misleading characterization of what happened. What happened was, we filed, we approached CenturyLink and said we would like to file arbitrations.

We're happy to work through a reasonable practical way to address this. If you want to tell us people who you think have a threshold issue who can't go, we're happy to do that. If you want to talk about some alternative structure, we're happy to do that. Our view is that these people are barred by the arbitration clause from court, and we're actually going to try to vindicate their rights this way.

And CenturyLink said, well, what we demand is that before you bring arbitration, we go through row by row and line by line and spend 15 minutes on each person. We said that's not required by the agreement. It just says we present the claim to you, and then you have a chance to resolve it. If you don't do it, we can go to arbitration. We're happy to discuss a pragmatic practical way to do it, but that's a needless hurdle that we are not going to agree

to as an extra contractual requirement.

We nowhere said, oh, we can't represent these people or we are not going to spend 15 minutes on their claims, and frankly, the time it took for us to move forward with these claims is because we put a ton of work into them. So I have to correct the record on that. The idea that we didn't show up, again, nothing required -- okay. I'll cut to the chase.

THE COURT: I had to pull your chain on that one.

MR. POSTMAN: All right. Thank you. Understood. I'll cut to the chase. If, you know, movants had to file very quickly to attack the injunction. I think, I expect, that when we talk to them and say if the injunction is lifted you can go forward with arbitration, they will opt out. I think that is the simplest thing.

If the injunction is lifted and if our clients can opt out the way the opt-out was done in *Park Nicollet*, which was what *Piper Fund* said had to happen, if those two things happen, we want nothing to do with the MDL. No offense. We don't want to be counsel here. Our clients we will send the Court's notice to. They will get all the same notice as everyone else anyway, and those who want to opt out, we would opt them out.

Those who want to participate, we will help them. We will take zero fees. We want no fees from any part of

the settlement. We would rather, as illustrated, we would rather not be here. We would just like that our clients who want to arbitrate get their right under the FAA to arbitrate, and we think that's a reasonable request.

If you eliminate the injunction and let us opt out the way that it happened in *Piper*, then we're fine.

THE COURT: All right. Thank you.

Mr. McNab, anything further?

MR. McNAB: Very briefly. Thank you, Your Honor. I just want to say, Mr. Postman kept referring to the agreement. If they have the agreement, we would love to see it. He claims that, well, this is what it says, but he won't produce it to the Court or to us. We don't believe that he can, and yet, he demands that this Court withdraw its injunction because his clients are somehow protected by the FAA.

The FAA only applies where there is a valid agreement to arbitrate. Part of their burden is to demonstrate that that is the situation here, and even then, the cases they cite do not stand for the proposition that a temporary injunction violates the FAA. Now, with respect to this --

THE COURT: Hold on. Mr. Postman, you have been challenged.

MR. McNAB: I'm sorry?

THE COURT: Mr. Postman, you have been challenged. Where is this agreement?

MR. POSTMAN: May I approach?

THE COURT: You may. Let's have fun.

MR. POSTMAN: I think we've got to be real here. You are someone who subscribes to the Internet. It shows up on your screen. This is all in the Beard declaration when CenturyLink moved to compel. You can't expect the consumer to either print out or save the arbitration agreement. They took the position in moving to compel that effectively every class member, if you're a customer of ours, you're subject to an arbitration agreement.

We asked them, please provide the specific arbitration agreement. We don't have it, and they ignored it. I think we all know that if we had filed a class action -- forget about the MDL. If a party files a class action, they will show up with that agreement in a second. We asked them for it. They didn't give it, and they're playing this coy game of saying, oh, you don't have it.

What we haven't heard them say is, we don't believe there is one. They're not actually disputing it. They're just saying, oh, can't find that piece of paper that no consumer has. I think that's a game, and it is unreasonable when they have taken the position in this court that every class member is bound by arbitration.

THE COURT: All right. Mr. McNab?

MR. McNAB: I think that is a mischaracterization of the position that we've taken. There are certain categories of customers who have consumer contracts with us that don't have arbitration agreements, which is why we have asked them for account information. We've asked them for what kinds of services did these individuals have? When did they have them? We're trying to determine that ourselves.

Second and more important, we did put a number of these arbitration agreements that do exist for certain consumers of certain products in front of this Court in connection with our motion. I don't know that every consumer that has been a customer of CenturyLink has an arbitration agreement. I suspect there are some, quite a number, who do not.

What I do know is that of all of the arbitration agreements that I have seen and that we have put in front of this Court, there isn't a one that looks anything like the *Piper Funds* arbitration agreement that promises an immediate right to arbitration. That's the categorical distinction here. That is what -- and the Court of Appeals talked extensively about why that was the basis of its decision and its carveout with respect to one of thousands of class members. So this notion, Mr. Postman says, well,

okay, we said we didn't want to opt out, but maybe we do. I'm not sure. We probably will, if you let us do it the way it was done by *Park Nicollet*.

Park Nicollet was very different. It was a massive institutional investment fund with lots and lots of lawyers who were able to give it more than 15 minutes of their time. All we are suggesting, and the order that was proposed to you and that you ultimately signed and is consistent with Rule 23 says that, yes, at the right time with the right notice, folks will be able to opt out if that is what they choose to do.

And if these three or other clients of Mr. Postman's make that informed decision at the right time in the right manner consistent with Your Honor's order, which itself is consistent with the requirements of Rule 23, they can do that, but in these circumstances where 22,000 people are ostensibly represented by someone who doesn't have 15 minutes of time for any of them, we just think that it makes sense that they receive the same treatment as everyone else.

And we've explained in our papers why that delay, if they are entitled to arbitrate at some point, that brief delay to ensure that they receive the proper treatment under Rule 23 is not a harm that is recognized by the law.

Thank you, Your Honor.

THE COURT: Thank you.

MR. GUDMUNDSON: Your Honor, if I may, just a few more remarks, and I think that Mr. Postman's --

THE COURT: I apologize. I only have one of my hearing aids in because I've got an ear infection in one of my ears, so I need you to speak into the microphone so I can hear you.

MR. GUDMUNDSON: The issue that Mr. Postman's rebuttal remarks raise is an issue of sequencing. It's an issue that for those who have been part of the meeting and conferring and discussing of these issues is a word I use a lot here. They say in their papers they do not seek to opt out, and here they say they seek to opt out under certain circumstances that I'm honestly not quite sure what they are, but it seems to me what they may be really after is some sort of a prior blessing that a certain type of opt-out is sufficient.

I don't think that that's possible. I think that what has to happen from a sequencing point of view is, they have to read *Piper* which we know they have, read the requirements of the settlement agreement, and present their request to opt out under the language of *Piper*. It may be that at that time a dispute arises, maybe even between the plaintiffs and CenturyLink and movants, maybe between all of us, as to the sufficiency of that opt-out.

But there is no question that that presentation of a request to exclude must be made under the language of *Piper*, and if they present that request and are denied, Your Honor will then be in a position to decide the sufficiency of the opt-out, and I -- my reading of the *Piper* language is that there are certain criteria, and I don't know what conclusion everyone would come to because it hasn't been presented yet, but I will repeat. I don't want to repeat myself too much, but we are obliged to follow the language of *Piper* as a binding Eighth Circuit precedent.

But, again, just to underscore it, that request to opt out must be made. That's all I have.

THE COURT: Thank you.

Mr. Postman, you have the last few minutes. Anything else that you want to respond to?

MR. POSTMAN: Thank you, Your Honor. I'll just note that I think to be pragmatic about this, the reason I talked about the opt-out as distinct from the injunction, I won't do another trip around the merry-go-round on the meaning of *Piper*, but --

THE COURT: I've got it here.

MR. POSTMAN: Yes. Yes.

THE COURT: It's going around and around.

MR. POSTMAN: We'll all go back and read it again

carefully. Whatever happens with the injunction, the simple point is, our clients have a contractual right not to have to jump through additional hoops to pursue arbitration based on a class action. I'll note that *AT&T v. Concepcion*, the seminal case saying that arbitration agreements get enforced, was about the complexity that arises when parties have to go through the class process and at the point of agreement, a notice to absent class members, all of that, and the point of an arbitration agreement is to avoid that.

So I will be very simple. In *Piper* we went and pulled the record. I'm happy to give people copies. The opt-out letter was a letter on behalf of Park Nicollet's counsel saying we're proceeding with arbitration. We don't want to participate in the class. I will represent to the Court, and I will confirm again when we send the opt-outs, that we will provide full notice. We've already done it to a large number of our clients of the court approved notice of the settlement. We will provide our frank advice as their attorneys about their options.

We will say if you want to participate in the class, we'll help you, and we won't charge you a dollar. If you want to proceed with your arbitration, we will do that for you, and those who choose to proceed with arbitration we will submit a letter, just like the one in

Piper Funds, saying these people want to proceed with arbitration.

I think the holding of *Piper* is that they don't have to jump through any more hoops once we do that, and we will be out of -- we won't be causing any more complexity in this proceeding. Thank you.

THE COURT: Anything further?

MR. McNAB: If I may, Your Honor. This is not so much about advocacy as about a practical situation here. We did submit the letter yesterday, and obviously we were well along in the process of preparing notice in accordance with Your Honor's order.

The uncertainty, particularly because of the nature of the proposed order that was submitted by the movants, which asks you on its face to stay the entire preliminary approval order, not just the injunction, left us in a position where we were damned if we do and we were damned if we don't. So as we indicated in the letter, right now if Your Honor was to deny this motion today or tomorrow or in the very near future, we would be able to pretty much fire up the process and be two weeks behind on the initial date. The March 10th target date moves to March 24th.

There is no telling, of course, what other consequences might be if Your Honor is either unable to

rule or grants the order. Until we see that we don't know. This is advocacy. I will be pretty candid about that. There is an order already out there. It's a valid order, and it describes exactly what the process is to opt out.

Now, I don't know if Mr. Gudmundson is suggesting that the order that we submitted collectively to the Court is somehow afoul of *Piper*. I don't think that's what he is saying, but unless an applicant is situated just like Park Nicollet was, I don't think that *Piper* requires that Your Honor has to deviate from the process that's already set forth in your order. Thank you.

THE COURT: Thank you. Anything further? All right. Thank you. I will take this under advisement.

(Court was adjourned.)

* * *

I, Kristine Mousseau, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/ Kristine Mousseau, CRR-RPR
Kristine Mousseau, CRR-RPR